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Supreme Court of the United States

NO. ~~1157~~ 257

JOE R. STEELE
Petitioner

versus

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Address to Court	1
Opinion (stated)	1
Jurisdiction	2
Questions Presented	
1.	2
2.	2
3.	3
4.	3
5.	3
6.	4
7.	4
8.	4, 5
Constitutional Provisions and Statutes	
Fifth Amendment	5
Sixth Amendment	5
Statement of Case	5-7
Argument	
I. (Germane to Questions 1, 3, 4 and 5)	7-11
II. (Germane to Question 2)	12-15
III. (Germane to Question 6)	15-20
IV. (Germane to Questions 7 and 8)	20-24
Conclusion	24-25
Prayer	25
Signature	25
Certificate of Counsel	26
Appendix A	27-36
Appendix B	37
Appendix C	38
Appendix D	39-40

AUTHORITIES

	Page
United States Constitution, Fifth Amendment	5
United States Constitution, Sixth Amendment	5
Baker vs. Hudspeth (10th Cir.) 129 F. 2d 779	18
Emspak vs. United States, 349 U.S. 190, 75 S. Ct. 687, 99 L. Ed. 997	10
Feuchtwanger vs. Manitowac Malting Co., (7th Cir.) 187 F. 713	10
Glasser vs. United States, 315 U.S. 60, 67	25
Gomila vs. United States, (5th Cir.) 146 F. 2d 372	17
Grunewald vs. United States, ... U.S. ....., (decided May 27, 1957)	8, 9, 12, 13, 15, 16
Johnson vs. United States, 318 U.S. 189, 63 S. Ct. 549, 87 L. Ed. 704	9, 17
Kotteakos vs. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557	11
Krulewitch vs. United States, 336 U.S. 440, 450, 69 S. Ct. 716, 93 L. Ed 790	22
Miller vs. United States, (10th Cir.), 120 F. 2d 968	18
Nash vs. United States, (2nd Cir.), 54 F. 2d 1006, 1007	22
Raffel vs. United States, 271 U.S. 494, 46 S. Ct. 566, 70 L. Ed. 1054	8
Slochower vs. United States, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692	11
Steele vs. United States, (5th Cir.), 222 F. 2d 28	5
United States vs. Antonelli Fireworks Co., (2nd Cir.), 155 F. 2d 631, 656	22
United States vs. Gottfried, (2nd Cir.), 165 F. 2d 360, 367	22
United States vs. Grunewald, (2nd Cir.), 233 F. 2d 556, 578	21
United States vs. Wood, 299 U.S. 123, 57 S. Ct. 177, 81 L. Ed. 78	19

Page

Walker Grain Co. vs. Blair Elevator Co., (5th Cir.) 254 F. 422 10

Rule 26, Federal Rules of Criminal Procedure 20, 21

Rule 19 (b), Rules of the Supreme Court, 1954 20

---

8 Wigmore on Evidence, Page 416 22

Model Code of Evidence, American Law Institute, 1942, Rule 106 (3) 23

Pennsylvania Statutes, 1911 23

Uniform Rules of Evidence (1953), Rule 21 23

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To The Honorable Supreme Court of The United States:

The Petitioner respectfully asks for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit to review a judgment of that Court affirming a conviction for income tax evasion in the District Court for the Western District of Texas, Austin Division.

Opinion

The opinion of the Court of Appeals was filed on April 26, 1957 and is not yet officially reported, but appears in Appendix A.

Jurisdiction

The judgment of affirmance was dated and entered April 26, 1957 (Appendix B). Petition for Rehearing was duly filed on May 14, 1957, within the 21-day period allowed therefor by Rule 29 of the Rules of the Court of Appeals for the Fifth Circuit. Such Petition for Rehearing was denied by order dated and entered June 11, 1957 (Appendix C).

Jurisdiction of this Court to review is granted by Section 1254(1) of Title 28, U.S.C.A., and Rule 37(c) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Has not the rule announced in *Raffel vs. United States*, 271 U.S. 494, been stripped of vitality by *Johnson vs. United States*, 318 U.S. 189, making it a violation of the privilege against self-incrimination to require a defendant, offering himself as a witness upon the second trial of a criminal case, to disclose to the jury that he had not testified as a witness in his own behalf upon the first trial?

2. Even if *Raffel vs. United States*, 271 U.S. 494, still has vitality after *Johnson vs. United States*, 318 U.S. 189, is it not necessary under the doctrine of *Grunewald vs. United States* (decided May 27, 1957 and not yet officially reported) for the Government to make some showing in the record, and for the trial court to find, inconsistency as a predicate to interrogation of the defendant on the second trial of a criminal case regarding his failure to testify as a witness in his own behalf at the first trial?

3. If it is error to require the defendant, offering himself as a witness upon the second trial of a criminal case, to disclose that he had not testified as a witness in his own behalf upon the first trial, can such violation of the privilege against self-incrimination be said to be "harmless error?"

4. Where a defendant, offering himself as a witness upon the second trial of a criminal case, is required to disclose to the jury that he had not testified as a witness in his own behalf upon the first trial, did it not serve to underscore, rather than cure, the error, for the trial judge to instruct the jury:

> "The evidence in this case has developed the fact that the case has been tried before. In that connection you are instructed that you will not consider for any purpose, nor discuss that fact in determining the guilt or innocence of the defendant. You will consider only the evidence adduced at this trial in determining the guilt or innocence of the defendant and not speculate as to the evidence introduced in the former trial." (R. 14-15)

5. Does not the doctrine and rationale of *Slochower v. Board of Education*, 350 U. S. 551, compel the conclusion that a defendant, under the circumstances aforesaid, is denied due process of law when his failure to testify in his own behalf at a former trial of the case is brought out by Government counsel, and the trial court advises the jury that evidence adduced at this trial may be considered in passing upon the guilt or innocence of the defendant?

6. Where at the outset of the second trial of a criminal case the trial judge issues instructions to all counsel that every effort is to be made to avoid any reference to the prior trial and no inquiry is made at the time of the issuance of such instruction as to whether defendant plans to take the stand in his own defense and such instruction is permitted to remain in force throughout the trial, is it not a denial of a fair trial under the Sixth Amendment as well as a denial of due process and a violation of the privilege against self-incrimination under the Fifth Amendment for the trial court to require the defendant, offering himself as a witness in his own behalf, to disclose that he had not testified as a witness in his own behalf at the first trial, particularly where the trial judge is notified of the defendant's intention to take the stand before he offers himself as a witness and the trial judge gives no notification of any change in the existing instruction?

7. Is it not a violation of the constitutional guarantee of a fair trial to require the defendant in a criminal case to testify in the presence of the jury that he was convicted more than ten years before the trial of a non-related felony offense, particularly where the defendant has not offered evidence as to his credibility and reputation for truth and veracity.

8. In a criminal income tax evasion case where gambling income is involved and evidence has been admitted (over objection) of a conviction for "gaming," a non-related felony offense more than ten years before the trial, is it not asking of the jury

an impossible mental gymnastic to instruct them to consider such evidence only in passing upon the credibility of the defendant and not in determining his guilt or innocence?

Constitutional Provisions and Statutes

Fifth Amendment

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * * * * ."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Statement of the Case

This appeal results from the second trial of this case. In the original trial Steele was convicted on all three counts of a three-count indictment for income tax evasion under Section 145 (b), Article 26, U.S. C. That conviction was reversed by the Court of Appeals for the Fifth Circuit in *Steele vs. United States*, 222 F (2) 28. At the second trial, count two of the indictment was dismissed and the jury found Steele guilty on count one and not guilty on count three. The sentence is for two years and $7500 fine (R. 1424; 1456). Bail pending appeal was granted by the trial judge (R. 1424; 1460). Bail was con-

tinued by the Court of Appeals, Fifth Circuit, pending this application (R. 1522).

The conviction was affirmed by the Court of Appeals for the Fifth Circuit (Appendix A), and rehearing was denied by order of that Court (Appendix C).

On the second trial of the case the defendant took the stand in his own behalf, and at the close of cross examination was required over defendant's objection, to answer the following question "Yes" or "No":

> "Mr. Steele, will you just give me a yes or no answer, The question will be asked in such a manner that it can be answered yes or no. Isn't it a fact that you did not take the stand in your behalf at a previous trial of this case." (R. 1074-6 & R. 1486).

At the request of defendant's counsel and before any proceedings were had in the second trial the trial judge instructed all counsel involved in the case that every effort was to be made to make no reference to the former trial (*R 1483*). This rule was adhered to throughout the course of the trial, and before the defendant was called as a witness the trial judge was notified of his intention to take the stand in his own behalf (R. 912-912A) and a ruling obtained on other matters. No mention was made by the trial judge during this colloquy (had out of the hearing of the jury) or Government counsel changing or amending the ruling then in existence.

Likewise before the defendant took the stand (R. 912 - 913A) defendant's counsel asked the Court to

instruct the prosecution not to interrogate defendant with reference to whether or not he had been convicted of a felony and the court refused such request, it being understood that the objection would go to all such testimony. Briefly summarized, the objection to admission of such evidence was on the grounds of remoteness (conviction in 1943 and trial in 1956); no connection between the former offense and the offense alleged in the indictment; the prior conviction having been for an offense not similar to those alleged in the indictment; the prejudice which would arise in the minds of the jurors against defendant; and the prior conviction being one for "gaming" under state law, it was not a crime involving moral turpitude. (R. 1487-89)

Thereafter during cross examination of the defendant the Government adduced evidence of the defendant's conviction in 1943 for "gaming, a policy game, a felony." (R. 1074)

Argument

I.

Cross Examination As To Claim of Privilege Against Self Incrimination
(Germane to Questions 1, 3, 4 & 5)

A major constitutional question is presented for the consideration of the Court by the cross examination of the defendant Steele with respect to his claim of privilege on the former trial. Omitting for the moment questions regarding the lack of proper predicate and the violation without warning of the

instruction of the court that the former trial would not be mentioned, the question presented here is identical with the question in *Raffel vs. United States*, 271 U.S. 494. At the first trial of the case Steel had claimed his privilege against self-incrimination by refraining from taking the witness stand. At the second trial he took the stand and at the close of cross examination he was compelled to answer, over objection, that he had failed to testify in his own behalf at the first trial. Thus his claim of privilege was used to his great detriment and for no other conceivable purpose than to inflame and prejudice the minds of the jurors against him. Consequently, this Court is faced with the decision as to whether *Raffel* can be permitted to endure and whether a defendant who claims a privilege guaranteed to him in the Constitution can, at some later date, not only be haunted by its exercise but also have such fact used in evidence against him.

> "In our civilization, our Constitution has rejected the idea of compelling a witness to give evidence against himself. Surely it is better so. Let us not condemn any man for merely asserting a right believed to be so fundamental that it is embodied in our Constitution itself." Joseph N. Welch, "The Challenge of the Learned Professions—The Law" - Journal of the American Judicature Society, Vol. 40, Nos. 5 & 6 (February - April 1957).

From the concurring opinion in *Grunewald vs. United States* (not yet officially reported) it seems clear that at least four members of this Court feel that the rule in *Raffel* has been strip-

ped of vitality by *Johnson vs. United States*, 318 U.S. 189, and that the same should be explicitly overruled. The majority of the Court did not feel that *Raffel* was directly involved in the *Grunewald* case and therefore expressly refrained from passing on the curent status of the *Raffel* rule.

The vice in *Raffel* and *Grunewald*, however, did not assume the far reaching proportions that it did against Steele. In both *Raffel* and *Grunewald* the jury was specifically instructed to confine the use of the evidence regarding the exercise of the privilege against self-incrimination to its consideration in passing upon the credibility of the defendant. Here the trial judge called attention to evidence that the case had been tried before and, while instructing the jury not to speculate as to what happened in the former trial, he nevertheless told them that they were to consider only the evidence adduced at this trial "in determining the guilt or innocence of the defendant." Thus, the best that can be said for the charge is that it says nothing as to what the jury was to do with the evidence about the claim of the privilege, and the worst that can be said of it is that the jurors were specifically advised to consider the claim of the privilege in passing upon the guilt or innocence of Steele.

Interestingly enough, the opinion of the Court of Appeals (Appendix A) attempts to use this portion of the charge to gloss over the error which was committed by saying:

> " . . . the error was the technical one of asking a question, the answer to which was immaterial and irrelevant."

The Court of Appeals uses such portion of the charge, together with evidence adduced on redirect to the effect that the defendant did not take the stand at the first trial on advice of counsel, and on surrebuttal, to the effect that at the former trial the defendant was convicted, sentenced and that the conviction was reversed on appeal — all to make the error "harmless error" under Rule 52A.

The Federal Appellate Courts have consistently held that an exception to the admission of incompetent evidence is not waived or withdrawn by having the explanation of the witness go to the jury. *Walker Grain Co. vs. Blair Elevator Co.* (5th Cir.) 254 F. 422; *Fuechtwanger vs. Manitowac Co.*, (7th Cir.) 187 F. 713.

And this Court in *Emspak v. United States*, 349 U. S. 190, 198, has held that constitutional rights may not be waived upon "vague and uncertain evidence," for:

> "To conclude otherwise would be to violate this Court's own oft-repeated admonition that the courts must indulge every reasonable presumption against waiver of fundamental constitutional rights." (Citing cases in footnote)

What the Court of Appeals has done here is to combine an improper and erroneous charge with evidence properly used to attempt to combat the gross error committed and to conclude that such combination renders the result "harmless error."

This is a novel and, petitioner says, fallacious concept.

Not only does the harmless error rule itself confine "harmless error" to those items which do "not affect substantial rights," but this Court, in *Kotteakos vs. United States*, 328 U.S. 750, in circumscribing the limits of the harmless error rule, strongly indicated (at Page 773 of the opinion) that violation of a constitutional right can never be "harmless error," saying:

> "But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

Finally, this Court in *Slochower vs. Board of Education*, 350 U.S. 551, asserted:

> "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. . . . In *Ullman vs. United States*, 350 U.S. 422, 100 L. Ed. 511, 76 S Ct. 497, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."

II.

Necessity for Predicate to Attack Credibility of a Witness
(Germane to Question 2)

Evidence of the claim of privilege on the first trial in *Raffel vs. United States* was admitted not on the theory that it had any relevance or materiality in determining the guilt or innocence of the accused but only in passing upon his credibility. No authority has been found wherein such evidence has been held proper as bearing upon the merits of the case and it is believed none exists. Consequently, if the Government seeks to justify the admission of this evidence as bearing upon the guilt of the defendant, then it is respectfully submitted that it was clearly and patently erroneous to admit it; that the objection as to its relevance and materiality should have been sustained and that a reversal of the case is in order.

On the other hand, if the admission of the evidence is sought to be justified on the theory that its use was to be confined to testing the credibility of the defendant, then, there being no conflict here, the case should likewise be reversed. Turning aside from our fundamental contention that a claim of a constitutional privilege should never be permitted to be used as a basis for attacking the credibility of a defendant and that in consequence *Raffel* should be explicitly overruled, there was no basis for the asking of the question of the defendant Steele. The majority opinion in *Grune-*

wald vs. United States holds that there must be a preliminary finding by the trial judge, with a basis in fact, that some inconsistency exists between the prior silence and the testimony given at the trial; otherwise the silence at the former trial may not be used for impeachment purposes. The majority of this Court in its opinion in the *Grunewald* case found in Footnote 30 that ". . . there was no inquiry by the judge at the time of the initial admission of this evidence as to whether a sufficient showing of inconsistency had been made."

This same statement is equally applicable to the occurrence in the Steele trial.

The majority opinion in *Grunewald* designated as "the threshold question" whether the trial court erred in holding

> ". . . that Halperin's plea of the Fifth Amendment privilege before the grand jury *involved such inconsistency with any of his trial testimony as to permit its use against him for* impeachment purposes." (emphasis added)

The record in the case at bar is completely devoid of any showing whatsoever of inconsistency. Neither is there any inquiry shown on the part of the trial judge. All we have here is a bare question and a bare answer, both calculated to inflame and prejudice the minds of the jurors against the defendant.

Thus the rule in *Raffel*, if it is to stand at all, has been confined within very narrow limits by the *Grunewald* opinion:

> "We do not think that *Raffel* is properly to be read either as dispensing with the need for such

> preliminary scrutiny by the judge, or as establishing as a matter of law that such prior claim of privilege with reference to a question later answered at the trial is always to be deemed to be a prior inconsistent statement irrespective of the circumstances under which the claim of privilege was made."

There is no showing here, as there was in *Raffel*, that any statement of the defendant as a witness conflicts with any Government evidence adduced *at the former trial*. The record here simply does not show the slightest basis for the asking of the question. The majority opinion issued by this Court in *Grunewald vs. United States*, furthermore, makes it clear that this Court will closely scrutinize the findings of the trial judge as to the existence of inconsistency and, finding none, will reverse the case because of prejudicial error of the trial court in permitting cross examination of the defendant on the use of his privilege against self-incrimination. The Court summarized the matter thusly:

> "But where such evidentiary matter has grave constitutional overtones as it does here, we feel justified in exercising this Court's supervisory control to pass on such a question. This is particularly so because in this case the dangers of impermissible use of this evidence far outweigh whatever advantage the Government might have derived from it if properly used."

Petitioner submits that the ruling of the trial judge as affirmed by the Court of Appeals is in

direct conflict with the decision of this Court in *Grunewald (Halpérin) vs. United States.*

III.

Violation of the Court's Existing Instruction as Violation of Fifth and Sixth Amendments

(Germane to Question 6)

Upon requst of defendant's counsel, made before the presentation of any evidence, the court instructed all attorneys in the case that every effort would be made to avoid any reference of any kind or character to the fact that the case had been tried before (R. 1483). Before the defendant took the stand the court was notified of the fact that he was going to be a witness in his own behalf, and, while other matters were discussed out of the hearing of the jury at length, the court made no mention of any contemplated change in this "ground rule" instruction (R. 912 - 912A). Following this discussion the defendant took the stand and at the close of cross examination of the defendant the Government was permitted over objection to elicit a "Yes" answer to the question, ". . . Isn't it a fact that you did not take the stand in your behalf at a previous trial of this case?" (R. 1076 and R. 1486). During the colloquy which occurred at the bench out of the hearing of the jury while objection was being made to the question, the existing "ground rule" was called to the attention of the trial judge and he stated that such rule had been adopted ". . . before I knew the defendant was going to take the stand" and that his changed ruling was "based on a Supreme Court de-

cision" (R. 1075 - 1076). No limitation was placed at the time of its adoption on the existing "ground rule" by the trial judge based upon whether or not the defendant was to testify and no notice was given as to any contemplated change until the Government at the very end of its cross examination asked the question involved.

It is the contention of this defendant that what happened here was far more aggravated than *Raffel* and *Grunewald* combined. Of course, had any witness who had testified at the previous trial given conflicting testimony with his evidence at the former trial, then undoubtedly his evidence at the former trial could have been used for impeachment purposes notwithstanding the existing "ground rule," but no such eventuality developed. The rule adopted by the court was strictly adhered to throughout the trial and the defendant, who had not testified at the previous trial, had every reason to believe that the rule would be enforced as adopted, particularly as to him, because there was nothing about his silence which could be properly used for impeachment purposes. It is, therefore, respectfully submitted that Steele took the witness stand in reliance upon the "ground rule" instruction and that the same was an inducement to him to testify.

> "The problem here is a different one. It is whether a procedure will be approved which deprives an accused on facts such as these of an intelligent choice between claiming or waiving his privilege. Knowledge that a failure to testify, though permitted by the Court, would be submitted to the jury might seriously affect

> that choice. If the accused makes the choice without that knowledge, he may well be misled on one of the most important decisions in his defense. We would of course not be concerned with the matter if it turned only on the quality of legal advice which he received. But the responsibility for the misuse of the grant of claim of privilege is the court's. It is the court to whom an accused properly and necessarily looks for protection in such a matter." *Johnson vs. United States*, 318 U.S. 189, 198, 199.

The denial of a fair trial under the peculiar facts and circumstances of this case is predicated upon the concept that when a "ground rule" is adopted by the trial judge and passed on to all counsel in the form of a specific instruction, then the defendant and his counsel are entitled to timely, fair and full notice when that ground rule is changed during the course of the trial. It is patent from the record that no such notice was given to defendant or his counsel of any change in the existing rules which were to pertain to the trial of the case. No mention was to be made of the former trial, and yet at the very end of the cross examination of the defendant a direct question was asked of the defendant relating to his conduct at the former trial. This was a violation not only of the fair trial guaranty made by the Sixth Amendment but also of due process under the Fifth Amendment.

The Court of Appeals for the Fifth Circuit in *Gomila vs. United States*, 146 F. 2d 372, stated that a

> "fair and impartial trial is guaranteed to every defendant, and [this] fundamentally

means a trial before an impartial judge and by an impartial jury."

The Court of Appeals for the Tenth Circuit has aptly said:

> "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen." *Miller vs. United States*, (10th Cir.) 120 F. 2d 968.

The effect of occurrences of this kind has been described as follows:

> "The denial of a fair and impartial trial as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process, demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction for a criminal offense illegal and void . . ." *Baker vs. Hudspeth*, (10th Cir.) 129 F. 2d 779 (Certiorari denied 63 S. Ct. 291, 317 U.S. 681, 87 L. Ed. 546).

The Courts have never laid down any hard and fast rule or test by which the concept of a fair trial can be accurately measured in every instance. However, this Court has adopted a test which would

seem peculiarly applicable under the facts and circumstances here presented:

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular test and procedure is not chained to any ancient and artificial formula." *United States vs. Wood*, 299 U.S. 123, 57 S. Ct. 177, 81 L. Ed. 78.

To say that the trial judge did not know when the "ground rule" was adopted that defendant was to take the stand is to beg the question. Certainly defendants in making important decisions during the course of trial should not be charged with knowledge of the undisclosed mental processes of the trial courts.

Petitioner does not allege a calculated effort on the part of the learned trial judge to militate against his interest. But the cases require no such motive or intent. They do require a fair trial. The asking of the question in the presence of the jury and the sanction thereof by the court in the light of the unchanged, existing instruction which had induced defendant to become a witness in his own behalf was a denial of a fair trial. It was a denial of due process. To use a rough metaphor, it changed the rules in the middle of the game without an iota of warning.

It is respectfully submitted that the approval by the Court of Appeals of this occurrence has so far sanctioned a departure from the accepted and usual

course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 19 (b), Revised Rules of the Supreme Court of the United States, July 1, 1954.

IV.

Evidence of Conviction For Non-Related Felony Offense

(Germane to Questions 7 & 8)

The question here relates to the correctness of the trial court's ruling in admitting evidence, over objection, of a conviction of the petitioner for "gaming" more than thirteen years before this trial.

It is the position of petitioner that because of the remoteness of this offense, because it is completely dissimilar to income tax evasion, and because the only possible effect of the evidence would be to prejudice the minds of the jurors against the defendant, it should not have been admitted by the trial judge.

Petitioner is well aware of the numerous cases that hold that when a defendant takes the witness stand evidence of a conviction of a felony or for a misdemeanor involving moral turpitude may be admitted. This has as its basis the common law which has been followed in view of Rule 26, Federal Rules, Criminal Procedure, providing as follows:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the

> competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law *as they may be interpreted by the courts of the United States in the light of reason and experience.*" (emphasis added).

Petitioner asserts that the position heretofore taken should be carefully re-examined. The principles of the common law should be applied, but they should be applied "in the light of reason and experience." In view of this language it has been asserted that the rule heretofore adopted by the courts pertaining to the admissibility of such evidence could be changed without statutory enactment. *United States vs. Grunewald*, (2nd Cir.) 233 F. 2d 556, 578.

It has always been deemed proper, if indeed not mandatory, that when evidence of a former felony conviction is admitted as against a defendant, to include in the charge a cautionary instruction advising the jury not to consider the same in passing upon the guilt or innocence of the defendant but to confine such evidence to the issue of credibility alone. Such a cautionary instruction was given in the trial of this case. (R. 1412).

The difficulty with admitting this type of evidence as against a defendant and the use of the cautionary charge is that it does not achieve the desired result. Juries are unable to engage in the mental gymnastic of segregating and separating this evidence from the issue of innocence or guilt.

Instructions such as this have been severely criticized in *Krulewitch vs. United States*, 336 U.S. 440, 450:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . , all practicing lawyers know to be unmitigated fiction."

Judge Learned Hand has questioned the efficacy of such cautionary instruction on numerous occasions, stating in *Nash vs. United States*, (2nd Cir.), 54 F. 2d 1006, 1007, that it constitutes "The recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else," and in *United States vs. Gottfried*, (2nd Cir.), 165 F. 2d 360, 367, "nobody can indeed fail to doubt whether the caution is effective," and finally in a dissenting opinion in *United States vs. Antonelli Fireworks Co.*, (2nd Cir.), 155 F. 2d 631, 656, stating that the cautionary instruction may emphasize the very matter the jury is told to forget, "as in the story, by Mark Twain, of the boy told to stand in a corner and not think of a white elephant." Professor Wigmore (8 Wigmore Page 416) has characterized such instructions as "artificial fictions" and has condemned the process as one which attempts "to enlist the layman in the process of nullifying his own reasoning powers" which, he concludes, is futile and tends toward confusion.

The necessity of giving the cautionary instruction merely serves to underscore the reason for a change in the existing rule. If it is necessary when such evidence is admitted to attempt to rectify the situ-

ation by giving a charge which has been so frequently held to be ineffective, then would it not be more reasonable and logical to exclude the evidence in the first place?

One existing statute and several proposed statutes would limit the use of such evidence to impeaching the credibility of a defendant only if (1) the evidence of the former crime is relevant as tending to prove the commission of the crime for which he is on trial, or (2) he affirmatively introduces evdience for the sole purpose of supporting his own credibility. See Model Code of Evidence, American Law Institute 1942, Rule 106 (3); Uniform Rules of Evidence (1953) Rule 21; Pennsylvania Statutes 1911.

In the foreword to the Model Code of Evidence, American Law Institute, supra, Prof. Edmund Morgan, at page 22, says:

> "Rule 106 (3) is intended to encourage an accused to take the stand by limiting the right to impeach him. If he testifies and introduces no evidence for the sole purpose of supporting his credibility, the prosecution may not, for the sole purpose of impairing his credibility, cross-examine him or introduce extrinsic evidence concerning his commission or conviction of a crime; if he does introduce evidence for the sole purpose of supporting his credibility, then the prosecution may impeach him like any other witness. This rule does not exclude evidence of his commission of any other crime relevant as tending to prove his commission of the crime for the commission of which he is on trial."

The Court of Appeals in its opinion likewise relies upon the harmless error rule with reference to this

evidence. This is so, says the Court, because the record is replete with evidence of gambling income. But petitioner respectfully asserts that direct evidence that he was a convicted felon could easily have been the deciding factor in the minds of laymen who find it difficult to consider this evidence when passing upon the credibility of the defendant and then dismiss it completely from their minds when passing on the issue of guilt or innocence. If it was error to admit the evidence, certainly it is wrong and an erroneous theory to say that it was harmless error.

Conclusion

The jury conducted lengthy deliberations in reaching its verdict in this case. It finally acquitted the petitioner on one count of the indictment and found him guilty on the other. In these circumstances who can say that the error which was committed in the improper admission of evidence was "harmless error"? The evidence as to the claim of privilege on the former trial was patently inflammatory and prejudicial. In attempting to show the relevance of the evidence in its brief in the Court of Appeals the Government made it clear that it wanted the jury to infer from such evidence that the defendant had a "made up" defense. Its brief asserts:

> ". . . the defendant had had some two years to review the Government's evidence and to set up a defense."

The culmination of the harm which was intended to be injected into the case by evidence of the silence

of the defendant at the first trial occurred in the closing argument of Government counsel as follows:

> "I've already mentioned about his appearance on the stand here, *the first time he's ever come forward in this case to offer these explanations.*" (R. 1388)

The attitude of this Court with reference to the attempted application of the "harmless error" doctrine to cases such as this is reflected in the following language from *Glasser vs. United States*, 315 U.S. 60, 67:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be granted and that the judgments below be reversed and petitioner be granted a new trial.

JOE R. STEELE, *Petitioner*

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and
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I hereby certify that I have delivered a copy of the above Application for Writ of Certiorari to counsel named above by depositing in the United States Mail, with first class postage prepaid, to the Post Office address indicated in each instance.

BEN F. FOSTER

Appendix A

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 16234

JOE R. STEELE,
Appellant,
versus
UNITED STATES OF AMERICA,
Appelle.

Appeal from the United States District Court for the Western District of Texas

(April 26, 1957.)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

HUTCHESON, Chief Judge: Tried on an indictment charging income tax evasion, in Count One for the year 1947 and in Count Three for the year 1948,

defendant was acquitted on Count Three and convicted and sentenced on Count One to two years imprisonment and a fine of $7500.

As on the previous trial, the conviction in which was reversed, *Steele v. United States*, 222 F(2) 28, while no specific item of unreported income was shown by direct evidence, the government undertook to show understatements of income by the net worth and expenditures method.

Appealing from the verdict and judgment, appellant attacks the trial as unfair and affected with prejudicial error in two respects. One of these is permitting the government, on cross examination of the defendant after he had taken the stand in his own behalf and over defendant's objection, to elicit the answer "Yes" to the question:

> "Mr. Steele, will you just give me a yes or no answer. The question will be asked in such a manner that it can be answered yes or no. Isn't it a fact that you did not take the stand in your behalf at a previous trial of this case?"

The other is permitting the government, over defendant's objection that the offense was too remote in time and that it was unrelated to the offenses for which he was on trial, income tax evasion, to interrogate the defendant on cross examination regarding a prior felony conviction for gaming.

In addition to these attacks upon the trial procedure, appellant makes the fundamental attack

upon the verdict and judgment, that the evidence was insufficient to sustain it and that a verdict of acquittal should have been and should now be directed on his motion for acquittal.

Confidently urging these claims upon us, singly and together, in a well written and argued brief, appellant insists that they are all well taken and should be sustained, while the United States, resisting the claims with equal confidence and vigor, insists that no reversible error attended the trial and that the judgment must be affirmed. For the reasons hereafter stated, we agree that this is so.

Upon its first point, appellant, insisting that on principle the answer sought and elicited was without testimonial relevancy and its admission was error, urges upon us that it was highly prejudicial error both because the very nature and frame of the question cast an aspersion upon him for not having taken the stand, thereby violating his constitutional right to refrain from testifying on the former trial, and because the defendant had taken the stand in reliance upon the prior ruling of the court that the former trial should not be referred to. Arguing that the Supreme Court in the Johnson case, 318 U.S. 189, has foreshadowed its departure from the Raffel case, *Raffel v. United States*, 271 U.S. 494, and that the recent grant of certiorari in the case of *United States v. Grunewald*, 233 F(2) 556 has confirmed this departure, the appellant asks us to hold that there was error in asking the question, or, if we will not do so, to withhold our decision until the Supreme Court has acted in the Grunewald case.

We are of the clear opinion that neither of these requests should be granted. This is so both because it is clear that, under the decisions as they now stand,[1] there was no error in admitting the evidence and because the facts and issues in the Grunewald case are different from those here, and no sufficient showing is made that a reversal of the decision in Grunewald would require a reversal here. Indeed, when the point now under discussion is considered in the light of the whole record, it seems clear that, if it was error to admit the evidence, the error was the technical one of asking a question, the answer to which was immaterial and irrelevant, (Cf. *Raffel v. United States*, 271 U.S. 494, at page 497) which, under Rule 52(a) was "harmless error".[2]

While the government in its brief does argue that the question was relevant because, as stated in the Raffel case, if the cross examination had revealed "the real reason for the defendant's failure to con-

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[1] Including the testimony of the defendant on redirect, that it was upon the advice of his counsel that he did not take the stand, and his surrebuttal testimony, that he was convicted on the trial and given a sentence, and that his conviction was set aside on appeal, and the instruction of the district judge:

"The evidence in this case has developed the fact that the case has been tried before. In that connection you are instructed that you will not consider for any purpose, nor discuss that fact, in determining the guilt or innocence of the defendant. You will consider only the evidence adduced at this trial in determining the guilt or innocence of the defendant and not speculate as to the evidence introduced in the former trial." (Record pp. 14-15)

[2] "52(a) Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Rules of Criminal Procedure, 18 U.S.C. pp. 570-572, and Ann. Pocket Part p. 236-238 Incl.

tradict the government's testimony on the first trial was a lack of faith in the truth or probability of his own witness, his answer would have a bearing on his credibility and on the truth of his own testimony in chief", here the question was strictly limited to an answer "Yes" or "No". No effort was made to follow the answer up, and the district judge by his instruction excluded the whole matter of the former trial from the jury's consideration.

Appellant's argument that the matter is made more serious by what he calls the ground rule laid down by the judge at the beginning of the trial, that no reference should be made to the former trial, will not, we think, stand up because as the court stated, and it was in effect admitted, at that time it was not supposed that the defendant would take the stand.

Finally, the verdict of the jury, convicting the defendant of the smaller amount of evasion charged in the 1947 tax year and acquitted him of the larger amount in the 1948 tax year, shows plainly that the defendant took no prejudice from the ruling but, on the contrary, obtained a benefit from the defendant's answer, that he was convicted and sentenced to four years, and the judgment was reversed.

On its second point, appellant stands no better. Indeed, not as well. Admitting that it is the general rule that when a defendant takes the witness stand he may be impeached as any other witness, and that there are many cases holding that the admission of evidence of convictions of a felony or of a mis-

demeanor involving moral turpitude is not error, he yet urges upon us that, in admitting this evidence under the facts and circumstances, the district court abused its discretion and the admission was prejudicial error.

We cannot at all agree. We think that but for the matter of remoteness in time there could be no basis for the claim and that, in admitting the evidence under the circumstances of this case, the court was well within its discretion. If, however, we should be mistaken in this, it is quite plain that no prejudicial error occurred. Defendant was allowed to and did show that he received a pardon. Besides, since the major part of the evidence in the case dealt with gambling and the profits derived therefrom, the proof of the conviction for gaming could not be said to have in any way introduced a new element into the case which reflected discreditably upon appellant. If he was prejudiced by the fact of his gaming, the prejudice was established by the necessarily relevant evidence as to the source of his income, and if that did not prejudice him, the mere fact that he had been convicted in connection with his business and received a pardon certainly could not be said to do so. The whole design and purpose of Criminal Rule 52(a) emobdying and carrying forward the long continued provision for harmless error embodied in the statutes, was, while protecting a defendant from substantial and harmful error, to prevent wholesale reversals for immaterial and harmless error.

As the Supreme Court said in the Lutwak case, 344 U.S. at 619: "A defendant in entitled to a fair

trial but not a perfect one.' See also *Elder v. United States*, 213 F(2) 876.

Devoting a large portion of its brief to the presentation of his third and final point, that a verdict of acquittal should have been directed, appellant, by an argument, falling short we think of demonstrating as a matter of law that no case for a jury verdict was made out, so invests with plausibility the claim made to the trier of facts, that on the evidence as a whole he ought not to have been convicted on either count, as to furnish a common sense explanation for the verdict which, convicting him on one count, acquitted him on the other. In short, while the argument, viewed as a jury argument, skillfully and effectively, from defendant's standpoint, points to and attacks the claimed factual weakness in the government's evidence as to the opening net worth as of January 1, 1947, it fails to demonstrate, as it claims to do, that the evidence made mandatory the direction of a verdict on the first count. When the appellant was here before, this court, on full consideration, determined adversely his contention that a verdict of acquittal should have been directed because (a) the proof was insufficient to establish an accurate opening net worth as of January 1, 1947, and (b) there was no showing of willfullness.

The evidence adduced by the government in support of its opening net worth on this trial was substantially the same as that it introduced on this point on the first trial, and the testimony of the defendant on this trial did not, as matter of law, effect any change.

As to the claim that the government failed to establish, as a matter of law, a reasonably accurate closing net worth, no such claim was apparently made on the first appeal, and the argument now made presents nothing more than an argument on the facts which the jury has rejected.

Apparently the defendant is of the opinion that the cases hold that in this kind of case the government's proof must attain the accuracy of a scientific demonstration, and that any failure to attain to this standard or any discrepancies in the proof will be fatal to the government's case.

We have been pointed to, we have found, no decision so holding.

Here, as in his argument in respect to the opening net worth statement, appellant makes nothing more than a jury argument against the sufficiency of the proof. He does not, he cannot, show that if the government's evidence is believed, a case for the jury is not made out. In short, appellant, drawing on the cautionary admonition in the cases as to the duty of the courts to see that a defendant is not convicted on insufficient evidence, that when his extra judicial statements are relied on, they must be corroborated, and, confusing what the court said in the Calderon case with respect to the proof showing an increase in net worth "over the prosecution years", the appellant is seeking to make contentions and arguments, which are all right in their place as arguments to the trier of facts, serve as arguments

in support of a claim that, as matter of law, there are no facts to argue to a trier.

We find no merit in appellant's contentions and no support for his arguments in the trilogy of cases, *Holland v. United States*, 348 U.S. 121; *Smith v. United States*, 348 U.S. 147; and *U. S. v. Calderon*, 348 U.S. 161, he cites.

It is true that in each of these cases the court did point out the perils to the defendant inherent in the net worth method of proof and did enjoin upon the courts special precautions to see to it that the defendant was not thrown into the position by this kind of prosecution of having to prove himself innocent of the charges, and it did discuss and determine the law as to corroboration of extra judical admissions such as made here with regard to opening and closing net worth. The result, however, of these discussions and determinations was to make it clear that, while corroboration was usually necessary, "admissions given under special circumstances, providing grounds for strong inferences of reliability, may not have to be corroborated", and that "It is sufficient if the corroboration merely fortifies the truth of the conviction without independently establishing the crime charged". In Calderon's case where, unlike here, the defendant was convicted for evasion on each of the four counts charged, the court pointed out that corroborating evidence could be sought in the proof of both parties where the defendant introduced evidence in his own behalf after his motion for acquittal has been overruled, and that, "while the *evidence as a whole* must show a deficiency for each

of the prosecution years, *the corroborating evidence* suffices if it shows a substantial deficiency for the over all prosecution period." (Emphasis supplied)

Instead then of holding in effect, as the appellant claims it does, that if the government approaches a net worth case on "a prosecution year theory", if its proof fails in any respect, it must be held to have failed to make out a case for any of "the prosecution years", the court really held that while in order to recover in any year the government must show a deficiency for that year, "the corroborating evidence suffices if it shows a substantial deficiency for the over all prosecution period."

No reversible error appearing, the judgment is AFFIRMED.

Exhibit B

JUDGMENT

Extract from the Minutes of April 26, 1957

No. 16234

JOE R. STEELE,

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Appendix C

ORDER DENYING REHEARING.

Extract from the Minutes of June 11, 1957:

No. 16234

JOE R. STEELE,

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this Cause be, and the same is hereby, denied.

Appendix D

ORDER STAYING MANDATE FILED:-

June 13, 1957

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 16234

JOE R. STEELE, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable him to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days from June 11, 1957; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from June 11, 1957 there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the

mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from June 11, 1957, unless the above mentioned certificate shall be filed with the clerk of this court within that time."

DONE AT NEW ORLEANS, LA., this 13th day of June, 1957.

/s/ J. C. HUTCHESON, JR.
United States Circuit Judge